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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EDBERT ROBERT JAMES III,

Defendant and Appellant.

A153736

(Contra Costa County  
Super. Ct. No. 51615723)

In re EDBERT ROBERT JAMES III,

On Habeas Corpus.

A155361

Defendant Edbert Robert James III appeals his conviction following a jury trial of one count of first degree murder, one count of attempted murder and three counts of felony child endangerment, for which he was sentenced to 116 years' imprisonment. Defendant contends that the trial court erred in refusing to give a special instruction on self-defense that he requested, that the child endangerment statute is unconstitutionally vague, and that the court erred in failing to instruct on the lesser included offense of misdemeanor child endangerment. Defendant has also filed a petition for a writ of habeas corpus, which we have consolidated with the appeal.<sup>1</sup> In the petition he claims that his due process rights were violated in numerous respects. We agree only that the trial court erred in failing to instruct on misdemeanor child endangerment. In all other respects we shall affirm the judgment and deny the habeas corpus petition.

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<sup>1</sup> Defendant actually filed two identical petitions but subsequently withdrew one of the duplicative petitions (No. A155443).

## **Factual and Procedural Background**

There was testimony at trial of the following. On April 28, 2016, Reginald Atkinson, Jr., and Alonzal Dailey drove Atkinson's vehicle to a Valero gas station at the intersection of 37th Street and Cutting Boulevard in Richmond. Dailey testified that before entering the food shop at the Valero station, Atkinson pointed out to him that defendant was in the store. Dailey saw defendant pull a gun from the trunk of defendant's car and heard defendant tell his wife to drive across the street. He saw defendant put the gun in his waistband.

Dailey approached defendant and asked why he needed a gun. Defendant replied, "I'm just protecting myself." Atkinson returned to his car, opened the driver's door, and asked Dailey to give him his cellphone. Defendant then pulled out his gun and shot Atkinson, who fell to the ground. Defendant proceeded to shoot Atkinson several more times while standing over his body. Dailey got out of the car, started running away, and defendant shot in his direction several times, but missed. Dailey testified that neither he nor Atkinson had any weapons on their person or in the vehicle.

Richmond Police Officer Daniel Sanchez responded to the shooting and took Dailey to the police station where he identified defendant from a photo array. The surveillance footage captured the entire incident. Richmond Detective LaQuanna Caston recovered 15 bullet casings from the scene of the crime.

Diego Marcos, who sold fruit from a truck across the street from the Valero station saw a car pull into the driveway near him. After the shots were fired, Marcos observed a Black male enter the car that a Black female was driving. Defendant's three children, aged seven, eight and nine years old, were also in the car when the shooting occurred. According to Detective Caston, the distance between the point of which the shots were fired and the car at the time of the shooting had been around 163 feet.

Ten days after the incident, defendant was arrested in Las Vegas, Nevada.

In his defense, defendant testified that he was filling his vehicle with gas when Atkinson arrived at the Valero gas station. He claimed that after Atkinson walked into the

food shop he told his wife to return to the motel room where they were staying but his wife instead drove across the street.

Defendant testified that he heard Dailey say, “I know you got a hammer. We got hammers too,” referring to guns. He testified that he walked towards Dailey and said, “I just want to squash this. I don’t want no problems with you.” Defendant saw Atkinson walking towards his (Atkinson’s) car and told him, “I don’t want problems with ya’ll. I want to squash this.” Atkinson assertedly responded by saying, “I ain’t squashing shit.” Defendant stated he was walking back to his vehicle when he heard Atkinson say to Dailey, “hand me that.” Believing that Atkinson was reaching for a gun, fearing for his life and the lives of his family, he pulled out his handgun and shot at Atkinson. Defendant saw Dailey get out of Atkinson’s car and shot at him because he was afraid Dailey was going to attack him.

The jury found defendant guilty of one count of first degree murder (Pen. Code,<sup>2</sup> § 187, subd. (a)) with personal use of a firearm (§ 12022.53, subds. (b), (c), (d)); one count of attempted murder (§§ 187, subd. (a), 664) with personal use of a firearm (§ 12022.53, subd. (b)); and three counts of felony child endangerment (§ 273a, subd. (a)). The court found true enhancements of a second strike (§ 1170.12, subd. (b)) and a five-year enhancement for the prior robbery conviction (§ 667, subd. (a)(1)). Defendant was sentenced to an aggregate prison term of 116 years and 8 months<sup>3</sup> and timely filed a notice of appeal.

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<sup>2</sup> All statutory references are to the Penal Code unless otherwise noted.

<sup>3</sup> The court sentenced the defendant to 75 years to life for the first degree murder conviction (25 years to life, doubled for the second strike, plus 25 years for the firearm enhancement); 34 years for the attempted murder conviction (midterm of 7 years, doubled for the second strike, plus 20 years for the firearm enhancement); 2 years 8 months for one felony child endangerment conviction (one-third the midterm); plus 5 years for the prior conviction enhancement. The other two counts of felony child endangerment were stayed.

## Discussion

### 1. *The trial court's self-defense instruction was proper.*

The jury was instructed on self-defense with the standard CALCRIM No. 505 instruction. This instruction provides that the defendant acted in lawful self-defense if he reasonably believed that he was in imminent danger of being killed or suffering great bodily injury and that the immediate use of deadly force was necessary to defend against the danger. Further, “When deciding whether the defendant’s beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant’s beliefs were reasonable, the danger does not need to have actually existed. [¶] The defendant’s belief that he or someone else was threatened may be reasonable if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true. [¶] If you find that Reginald Atkinson, Jr., threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable.”

Defendant contends the trial court erred in refusing to give the following additional self-defense instruction that he submitted: “In determining the objective reasonableness of defendant’s imminent fear, the jury must view the situation from the defendant’s perspective. A defendant is entitled to have a jury take into consideration all of the elements in the case which might be expected to operate on his mind. Reasonableness is judged from the point of view of a reasonable person in the position of the defendant. A jury must consider all the facts and circumstances.”

Defendant argues that his proposed instruction emphasizing an objective reasonableness standard was necessary in light of his evidence bearing upon his defense of self-defense. Defendant presented testimony that, since childhood, he had been exposed to violence. He had witnessed multiple shootings and a number of relatives had died from gun violence. He also had previous encounters with Atkinson that threatened violence. Atkinson once went to his mother’s home wielding a weapon after defendant

got into a fight with Atkinson's friend. He and Atkinson encountered each other again at a 7-Eleven convenience store where, according to Dailey, it appeared that the two were going to fight. Defendant had also observed Atkinson shoot at a parked car eight times.

When reviewing challenges to jury instructions, we “must consider whether there is a ‘ “reasonable likelihood” ’ that the jury understood the charge in the way defendants suggest.” (*People v. Mackey* (2015) 233 Cal.App.4th 32, 108.) This court will consider the language of the instruction, the instruction as a whole, and the arguments of counsel. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1321.) “[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.” (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.)

There is no dispute over the need for an instruction explaining the reasonableness element of self-defense. The cases cited by defendant do no more than confirm the relevance of this factor. (*People v. Humphrey* (1996) 13 Cal.4th 1073; *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732.) The instruction that was given did not preclude consideration of the evidence to which defendant referred, and required the jury to “consider all the circumstances as they were known to and appeared to the defendant.” The standard instruction correctly stated the law and was fully adequate. (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495.) The court was not required to give a redundant instruction. (E.g., *Morales v. 2nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 526, 529.) The court did not err in refusing defendant's proffered instruction.

2. *Defendant's contention that section 273a, subdivision (a) is void for vagueness does not have merit.*

Defendant argues that the child endangerment statute, section 273a, is void for vagueness. Section 273a, subdivision (a) reads: “Any person who, under the circumstances or conditions *likely to produce* great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be

placed in a situation where his or her person or health is *endangered*, shall be punished by imprisonment in county jail not exceeding one year, or in the state prison for two, four, or six years.” (Italics added.) Defendant contends that “likely to produce” and “endangered” can have several meanings and the combination of the two terms “describes a situation that is so unclear.”

A statute with terms that are “ ‘so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates . . . due process of law.’ ” (*People v. McCaughan* (1957) 49 Cal.2d 409, 414, quoting *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) “ ‘In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct . . . a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that ‘the law is impermissibly vague in all of its applications.’ ” (*People v. Kelly* (1992) 1 Cal.4th 495, 534, italics in original.) The courts “are not obligated to ‘consider every conceivable situation which might arise under the language of the statute’ [citation] so long as it may be given ‘a reasonable and practical construction in accordance with the probable intent of the Legislature.’ ” (*People v. Smith* (1984) 35 Cal.3d 798, 810.)

The adequacy of the language defendant challenges has repeatedly been upheld. (*People v. Smith, supra*, 35 Cal.3d at p. 810 [section 273a is “not so uncertain or indefinite as to render [the statute] invalid”]; *People v. Deskin* (1992) 10 Cal.App.4th 1397, 1403 [the phrase “ ‘under the circumstances other than those likely to produce great bodily harm or death’ ” in section 273a, subdivision (b) is not unconstitutionally vague]; *People v. Harris* (1966) 239 Cal.App.2d 393, 397 [section 273a is not void for ambiguity]; *People v. Beaugez* (1965) 232 Cal.App.2d 650, 658 [willful conduct was not vague under section 273a].) We agree with these cases that the meaning of section 273a, subdivision (a) is sufficiently clear that a person of common intelligence can readily understand what conduct is prohibited. The statute is not void for vagueness.

3. *The trial court erred in failing to instruct on the lesser included offense of felony child endangerment.*

Defendant argues that the trial court erred in failing to instruct on the lesser included offense of section 273a, subdivision (b), misdemeanor child endangerment. Section 273a, subdivision (b) reads: “Any person who, under circumstances or conditions *other than those likely to produce great bodily harm or death*, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.” (Italics added.)

This court reviews the failure to instruct on an assertedly lesser included offense de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) “ ‘A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, “ ‘that is, evidence that a reasonable jury could find persuasive’ ” [citation], which . . . “ ‘would absolve [the] defendant from guilt of the greater offense’ [citation] *but not the lesser.*’ ” (*Ibid.*) When determining whether the lesser included offense instruction should have been given, this court views the evidence in the light most favorable to the defendant. (*People v. Mullendore* (2014) 230 Cal.App.4th 848, 856.) The purpose of instructing the jury on the lesser included offense “is to avoid forcing the jury into an ‘ ‘unwarranted all-or-nothing choice’ ’ which creates the risk the jury will convict on the charged offense even though one of the elements remains in doubt because ‘ ‘the defendant is plainly guilty of *some* offense . . . .’ ” (*Id.* at p. 857.)

The record here reflects that after an unreported instruction conference, both the prosecutor and defense counsel agreed that the instructions should include the lesser included misdemeanor offense. However, the court declined to give the instruction because it considered that “[t]he only difference [between subdivision (a) of section 273a and subdivision (b)] is there is a misdemeanor and a felony, but they are the same elements.” As the Attorney General implicitly acknowledges, the court was mistaken.

The felony proscribed in subdivision (a) requires that the defendant's conduct create a risk likely to produce great bodily harm or death while the misdemeanor can be committed without creating such a risk.

The Attorney General contends that the misdemeanor instruction nonetheless was not required because the evidence would not support a finding that defendant's conduct did not create such a risk. The Attorney General argues: defendant "discharged a nine millimeter handgun in close proximity to his children; he knew that his children were in the line of fire if there had been return fire; he exposed his children to full view of the shooting; and he ran to the waiting car containing the children carrying a loaded handgun." However, the evidence does not necessarily support this argument, which in all events was for the jury to decide. Neither Officer Sanchez nor Detective Caston, or any other witness, testified that the bullets were fired in the direction of defendant's car, which was across the street and more than 50 yards away. Diego Marcos, who was next to defendant's vehicle at the time of the shooting, did not testify that bullets were coming towards the car or towards him. The likelihood that the fleeing Dailey would have returned fire is at most questionable. Based on the record, we cannot say that given the lesser instruction, the jury would not have found that defendant's conduct was not likely to have caused great bodily harm or death to his children. Therefore, the conviction for the violation of section 273a, subdivision (a) must be reversed. On remand, the prosecutor may elect to reduce the offense to the violation of subdivision (b) or to retry the offense.

4. *There is no need to remand for the trial court to consider striking defendant's prior conviction.*

In a supplemental brief defendant contends that the matter must be remanded to permit the trial court to exercise its discretion under newly enacted legislation to determine whether to strike the five-year enhancement imposed under section 667, subdivision (a)(1). When the sentence was imposed the court did not have that discretion and on September 30, 2018, the Governor approved Senate Bill No. 1393 which deleted the restriction prohibiting a judge from striking that enhancement, effective January 1,

2019.<sup>4</sup> Normally, these facts would require remand. However, here the trial court was under the mistaken impression that it did have that discretion and expressly declined to strike the enhancement.<sup>5</sup> The court stated, “[T]he court knows it has the power to strike the prior conviction and based upon the circumstances of this case will not strike the prior.” Therefore, remand is unnecessary.

The court “is not required to remand to allow the court to exercise its discretion if ‘the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement’ even if it had the discretion.” (*People v. Jones* (2019) 32 Cal.App.5th 267, 272-273.)

#### 5. *Defendant’s pro se petition for a writ of habeas corpus*

In his habeas corpus petition, defendant claims he was denied due process in numerous respects, none of which has merit.

Defendant asserts a violation of *Brady v. Maryland* (1963) 373 U.S. 83 on the ground that prior to his preliminary hearing the prosecutor failed to advise him of Dailey’s juvenile adjudication for committing robbery with the use of a gun, which could have been used to impeach Dailey at the preliminary hearing. However, when the prosecutor discovered this fact, he notified defendant’s public defender of it 11 months before the start of trial. Prior to the start of trial the defendant filed a motion to dismiss the information for failure to timely comply with *Brady*. The motion was properly denied. Since the information was disclosed in advance of trial, it “is not considered suppressed, even assuming it should have been given to the defense earlier.” (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 51.)

Defendant was arrested by Detective Jason Wentz of the Richmond Police Department in Las Vegas on May 11, 2016 and the information charging him with

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<sup>4</sup> The bill amended section 1385 by deleting subdivision (b), which had provided, “This section does not authorize a judge to strike any prior conviction of a serious felony for the purposes of enhancement of a sentence under Section 667.”

<sup>5</sup> The court also declined to strike the firearm enhancement.

murder was not filed until May 17. Insofar as defendant claims that his extradition to California was therefore illegal, he waived the objection by consenting to the extradition.<sup>6</sup> Insofar as he is contending that the delay in charging and bringing him before a magistrate violated section 825,<sup>7</sup> he has shown no resulting prejudice and therefore is entitled to no relief at this time. “ ‘A violation of a defendant’s right to be taken before a magistrate within the time specified by the law does not require a reversal unless he shows that through such wrongful conduct he was deprived of a fair trial or otherwise suffered prejudice as a result thereof.’ ” (*People v. Valenzuela* (1978) 86 Cal.App.3d 427, 431; see also, e.g., *People v. Boyden* (1953) 116 Cal.App.2d 278, 286.)

Defendant makes a variety of arguments that should properly have been raised on appeal. He asserts that the evidence presented at trial does not support a conviction of first degree murder. “[R]outine claims that the evidence presented at trial was insufficient are not cognizable in a habeas corpus petition.” (*In re Reno* (2012) 55 Cal.4th 428, 506.) He argues that the prosecutor presented testimony from eye witnesses and experts that was false and that the prosecutor fabricated his argument to the court and jury using deceptive practices. In addition to other reasons for which this claim lacks merit, defendant failed to raise these objections at trial. “To preserve . . . a claim [of prosecutorial misconduct] on appeal, ‘a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety.’ ” (*People v. Clark* (2011) 52 Cal.4th 856, 960.) Defendant also contends that the trial court erroneously failed to strike the five-year enhancement based on his 2002 robbery conviction because the present crime occurred after expiration of the “washout” period in section 667.5, subdivision (b). However, the five-year enhancement

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<sup>6</sup> Defendant could have petitioned for a writ of habeas corpus to the Nevada magistrate under Nevada Revised Statute section 179.197 prior to the extradition proceeding but did not do so. The Contra Costa County information was filed the day after defendant waived extradition.

<sup>7</sup> Section 825, subdivision (a)(1) states: “[T]he defendant shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays.”

was imposed under section 667, subdivisions (a)(1), to which the washout period does not apply.

Defendant asserts that the reason the district attorney brought this case against him was vindictive, that the prosecutor did so because he had been disqualified from handling the 2002 robbery prosecution of defendant. Other deficiencies in this claim aside, a claim for discriminatory or vindictive prosecution must be raised in a pretrial motion to dismiss and not after trial and conviction. (*People v. Edwards* (1991) 54 Cal.3d 787, 827.)

Lastly, defendant contends that he received ineffective assistance of counsel because his public defender did not subpoena a witness who had seen Atkinson shoot another person, which testimony would have confirmed defendant's testimony that he had seen Atkinson shoot others. Without considering whether his attorney was deficient in this respect, we conclude under the second step of the *Strickland v. Washington* (1984) 466 U.S. 668, 688 analysis that there is no reasonable probability that this person's testimony would have affected the outcome of trial. (*In re Fields* (1990) 51 Cal.3d 1063, 1079.) There was no controversy over whether defendant had made such an observation, which in all events had nothing to do with the shooting on trial.

### **Disposition**

The convictions on counts 4, 5, and 6 for felony child endangerment are reversed and the matter is remanded for further proceedings on those counts consistent with this opinion. In all other respects the judgment is affirmed and the petition for a writ of habeas corpus is denied. The withdrawn petition (No. A155443) is dismissed.

POLLAK, P. J.

WE CONCUR:

TUCHER, J.  
BROWN, J.